

KEYWORD: Guideline E; Guideline D

DIGEST: Applicant has engaged in four instances of inappropriate touching of female employees. The Judge's negative credibility determination is supported by the record evidence. Adverse decision affirmed.

CASENO: 10-00362.a1

DATE: 06/15/2011

DATE: June 15, 2011

In Re:)
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-----) ISCR Case No. 10-00362
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Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT

James Green, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 9, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 9, 2011, after the hearing, Administrative Judge Shari Dam denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in her application of the mitigating conditions and whether the Judge’s whole-person analysis was erroneous. Consistent with the following, we affirm.

The Judge made the following pertinent findings of fact: Applicant is self-employed in a small business providing services at an Army base. 60 years old, he has been married for 37 years. In 2001 he retired from active duty with the Army as a Colonel.

The record contains evidence of four instances in which Applicant engaged in inappropriate touching of female employees. In April 2000, he pulled the top of a woman’s dress away from her body, asking “do you have any tan lines?” or words to that effect. The incident occurred in the workplace on base. Decision at 3.

In 2008, he pulled open another female employee’s blouse “to see if she was wearing a sexy bra.” The incident occurred in the workplace on base. Decision at 3.

On more than one occasion during the summer of 2008, he improperly touched a different female employee by touching her leg, thigh, and knee, and by rubbing her back. These incidents occurred in the workplace on base.

Finally, in late 2008, on more than one occasion, he improperly touched yet another female employee by rubbing her thighs and shoulders. These incidents occurred in the workplace on base.

As a consequence of this misconduct, in early 2009 the commander permanently barred Applicant from the base. Subsequently, Applicant obtained an evaluation by a psychologist, who concluded, among other things, that he had, as enduring personality traits, the initiation of social contact and the absence of insight. Decision at 4. Applicant also completed a sexual harassment training course, a course on illegal harassment, and another on preventing harassment in the workplace. Despite all this, the commander declined to rescind the debarment order.

Applicant met with a licensed clinical social worker and developed a treatment plan, to take place over a four- to six-month period. He sent the commander a letter apologizing “to anyone who feels that I have engaged in inappropriate conduct[.]” Decision at 5. However, the commander again declined to rescind the debarment.

Upon completion of the counseling sessions, Applicant's counselor stated that Applicant was unlikely to engage in similar misconduct in the future. Applicant's pastor also wrote a letter supporting Applicant's efforts to gain full access to the base. In January 2010, the commander gave Applicant "access to the base 'for purposes of conducting contract business related to' Applicant's business whenever requested by an agent of the U.S. Government." Decision at 6.

Applicant believes that the allegations against him grew out of the women having misconstrued his personal style of interacting with people. Applicant considers himself to be a "touchy-feely" person, in that he is physically demonstrative. He no longer touches female employees. His security officer, business partners, and wife are aware of the allegations against him.

In the Analysis portion of the Decision, the Judge addressed the various sessions of counseling and training which Applicant had undergone, along with the eventual rescission of his debarment. She stated that these matters showed some degree of mitigation. However, she went on to explain why she concluded that Applicant had failed to meet his burden of persuasion as to mitigation:

Applicant did not present persuasive evidence of his acknowledgment or understanding of the seriousness of his behavior. Throughout the record, Applicant denied all wrongful conduct. He consistently defended the allegations on the basis that four women misconstrued his actions, misperceived his "touchy-feely" personal style of interacting, or he denied they ever occurred. While that defense may be persuasive if one woman had complained, it is not credible given the detailed statements of four witness, two of whom claimed that he pulled down their blouses and two of whom stated that he rubbed (not casually touched) their thighs on more than one occasion. Applicant's explanation for the [women's] complaints lacks credibility and candor. Decision at 9.

Applicant has cited two cases by Hearing Office Judges which, he contends, are factually similar to his and in which the Judges granted the applicants a clearance. We give due consideration to these cases. However, each case must be decided upon its own merits. Directive, Enclosure 2 ¶ 2(b). Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See, e.g.*, ISCR Case No. 08-09236 at 4 (App. Bd. Jan. 14, 2010). The cases cited by Applicant actually contain significant differences from his own. In addition, one of the cases which he cites was reversed on appeal. These cases do not demonstrate that the Judge erred in her adverse determination.

The Judge's analysis is supported by the weight of the record evidence. The statements by the various complaining witnesses are detailed, internally consistent, and consistent with each other. That these statements cannot be reasonably be attributed to mere misperceptions supports the Judge's negative credibility determination.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found

and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s adverse decision is sustainable on this record. “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Judge’s adverse security clearance decision is **AFFIRMED**.

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board